PUBLIC PROSECUTOR v. MOHAMED SAID

[A.Cr.J. (Mohamed Azmi J.), August 17, 1982]

[Selangor – Criminal Appeal No. 132 of 1981]

Criminal Law & Procedure – Summary trial – Prosecution unable to produce witnesses despite postponement – Accused discharged by Magistrate – Accused subsequently re-charged by the prosecution – Witnesses still not available – Acquittal of the accused – Whether justified – Criminal Procedure Code (F.M.S. Cap. 6), s. 173(f) & (g).

In this case the respondent had been originally charged in 1979 for the offence of dangerous driving alleged to have been committed in September 1978. After a number of postponements the trial commenced on October 2, 1979. After six witnesses had given evidence for the prosecution the prosecution could not proceed as two material witnesses could not be traced. The part-heard case was adjourned from time to time until a final postponement was allowed for continued hearing on February 18, 1981. On that day the two witnesses were still not available and the Magistrate discharged the accused. Subsequently the prosecution re-charged the accused. When this second prosecution came up for hearing, the witnesses were still not available and in the event a final postponement was given to November 10, 1981. On that date the prosecution's application for an adjournment was refused. The Magistrate thereupon ordered that the accused be discharged amounting to an acquittal. The Public Prosecutor appealed.

Held: (1) the words "all such evidence" in paragraph (c) and the words "all the evidence" in paragraph (f) of section 173 Criminal Procedure Code must refer to available evidence at the time of trial. When, therefore, a Magistrate has exercised his discretion properly under section 259 of the Criminal Code in refusing to allow a further postponement after a final postponement has been granted, it is the duty of the Magistrate under 173(c) to take all such available evidence as may be produced by the prosecution in support of their case. If no such evidence is forthcoming or if the available evidence adduced is insufficient to establish a *prima facie* case against the accused than the Magistrate is entitled to record an order of acquittal under section 173(b) of the Criminal Procedure Code;

(2) in this case the proper exercise of the Magistrate's discretion under section 259 of the Criminal Procedure Code has not been challenged having regard to all the circumstances of the case. As such the learned Magistrate did not err in law in ordering an acquittal of the respondent under section 173(b) of the Code.

Cases referred to:

(1) *Chong Fook Kam & Anor.* v. *Shaaban & Ors.* [1968] 2 M.L.J. 50, 54.

(2) *Ling Ah Hun* v. *Public Prosecutor* [1960] M.L.J. xlv.

(3) *Mariapragasam* v. *Public Prosecutor* [1962] M.L.J. 173.

(4) *Public Prosecutor* v. *Hettiarachigae L.S. Perera* [1977] 1 M.L.J. 12.

(5) *Public Prosecutor* v. *Mahmud* [1974] 1 M.L.J. 85.

(6) *Chu Chee Peng* v. *Public Prosecutor* [1973] 2 M.L.J. 35.

(7) *Public Prosecutor* v. *Karumah* [1980] 2 M.L.J. 102.

(8) *Public Prosecutor* v. *Tan Kim San* [1980] 2 M.L.J. 98.

(9) *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578, 1595.

(10) *Public Prosecutor* v. *Goh Kee Chuan* [1967] 1 M.L.J. 174.

(11) *Kuppusamy* v. *Public Prosecutor* [1948] M.L.J. 25.

(12) *State of Mysore* v. *Abdul Hameed Khan* [1970] C.L.J. 112.

(13) *Public Prosecutor* v. *Sihabduin bin Haji Salleh & Anor.* [1980] 2 M.L.J. 273.

The following case were also cited in argument: *State of Hyderabad* v. *Mohd. Shakur* [1954] C.L.J. 687; *Prem Narain* v. *Shiva Prasad* [1962] 1 C.L.J. 801.

CRIMINAL APPEAL.

Gooi Soon Seng (Dy. Public Prosecutor) for the appellant.

Manjeet Singh for the respondent as *amicus curiae.*

Cur. Adv. Vult.

Mohamed Azmi J.: This is an appeal by the Public Prosecutor against the order of discharge amounting to an acquittal made by the Magistrate at Klang on November 10, 1981 in respect of an offence of dangerous driving under section 34A(1) of the Road Traffic Ordinance 1958.

The facts leading to the acquittal of the Respondent as contained in the appeal records and the submission of Mr. Manjeet Singh who appeared as *amicus curiae* for the Respondent, are not in dispute. They are as follows. The Respondent was originally charged in the same court before the same Magistrate and for the same offence of dangerous driving alleged to have been committed on September 1, 1978, vide case MA477/1979. He was arrested on the date of the alleged offence and released on bail on the same day. He pleaded not guilty to the charge ever since he first appeared in court on June 5, 1979. After a number of postponements, the trial finally commenced on October 2, 1979. After six witnesses had given evidence for the Prosecution, they could not proceed further as two material witnesses – Khor Khai Hong and Ng Yoke Thiam – could not be traced. The part-heard case was

adjourned from time to time until a final postponement was allowed for continuation of hearing on February 18, 1981. On that date, the two material witnesses were still not available. As the charge had been pending over Respondent's head since June 1979, and the part-heard case had been fixed on that date for final disposal, the Magistrate discharged the Respondent not amounting to an acquittal. Before ascertaining the availability of the two material witnesses, the Prosecution recharged the Accused for the same offence on April 29, 1981 vide the present case MA 625/1981. Thus, hardly 2½ months had passed from the date of discharge, the Prosecution again put the Respondent in jeopardy without even caring to ascertain whether they were able to proceed with their case. As it turned out, it is clear that the Prosecution knew at all material times, that their two material witnesses could not be traced. When the second prosecution came up for hearing on September 10, 1981, the Prosecuting Officer informed the court that they could not proceed as the same two witnesses were not available. In the event, a final postponement was granted to November 10, 1981. On that final date, Prosecution's application for further postponement was refused, and Miss John who appeared for the Respondent since June 1979 applied for a discharge amounting to an acquittal. The learned Magistrate agreed and made the acquittal order. In her grounds of decision, the learned Magistrate has this to say:

"... I order that the accused be discharged amounting to an acquittal. The accused was never absent when the case was called up in court. There are no other good reasons to postpone the case, if the prosecution was unable to trace their own material witnesses. It is unfair to postpone the case again because he suffered inconvenience to come to court since 1978 when the accident took place."

Before me, the learned Deputy Public Prosecutor did not dispute that the conduct of the Prosecution leaves much to be desired. Indeed, I would go further and say that the Prosecution's conduct is scandalous in allowing a road traffic case to drag on over a period of more than three years, from the date of Respondent's arrest on September 1, 1978. Such long delays are inexcusable for whatever the reason unless it can be shown to the satisfaction of the court that the two material witnesses for the Prosecution are genuinely avoiding service of the summons to appear in court. The mere fact that a material witness has changed address is not a good reason for granting numerous postponements unless it can be shown to the satisfaction of the court that the Police have all along acted with due diligence. If a particular witness is material to the Prosecution case, it is the duty of the police to keep track of his whereabouts and take all precautionary measures that they be informed of any change of address. Under section 34(ii) Criminal Procedure Code, the responsibility of serving summons or subpoenas on accused and witnesses are with police officers unless the court otherwise directs. If a particular witness is very material to the Prosecution case, it stands to reason that the police must exercise extra diligence in applying for summons early and in taking all necessary steps to ensure that the correct address of the witness has been obtained bearing in mind the unreliability nowadays of the address given in Identity Cards. The correct address of material witnesses should be obtained at the first opportunity and, if necessary, the Police can invoke sections 111 and 112 Criminal Procedure Code at the investigation stage. Section 111 empowers the Police to require their attendance at the police station so that they can be questioned under section 112. If they do not attend, then under sub-section (ii) of section 111, they may be compelled to attend by a Magistrate. (See *Chong Fook Kam & Anor.* v. *Shaaban & Ors.*[1]). Where the person to be summoned cannot by the exercise of due diligence be found, then under section 35(iv) Criminal Procedure Code, the summons may be served by leaving a copy thereof for him with some adult member of his family or with his servant residing with him. If service under section 35(iv) cannot be effected, then the Prosecution should invoke section 36 Criminal Procedure Code by affixing a copy of the summons to some conspicuous part of the house or other place in which the person summoned ordinarily resides, if so directed by the court. When a witness fails to appear in court after being served under section 35 or 36, the Prosecution are then entitled to apply for warrant of arrest under section 47. In the present case, it would appear that none of these powers given by the Criminal Procedure Code to compel appearance of the two material witnesses had been exhausted by the Police, either in the first or second prosecution. During the three years period, the Prosecution were merely content to inform the court that summons on the two witnesses could not be served and to apply for adjournment each time the case came up for disposal. This exercise in futility ended with the discharge of the Respondent in February 1979. The learned Deputy Public Prosecutor concedes that in re-

charging the Respondent two months later without first ascertaining that the two material witnesses were available, the Prosecution had failed to exercise due diligence. I would go so far as to say that such conduct is an abuse of judicial process. When the present case came up for final disposal in November 1981, the Prosecuting Officer merely repeated that the same two material witnesses in MA 477/79 were not available; a fact already well known to everyone concerned since 1978. In such a situation, is the court powerless to do anything? It is common ground that the learned Magistrate was correct in exercising her discretion under section 259 Criminal Procedure Code in refusing to allow further postponement. The phrase 'justice delayed is justice denied' is already well known and supported by a host of authorities. To quote the judgment of Rigby J. in *Ling Ah Hun & Anor.* v. *Public Prosecutor*[2], "Delays of this nature are wholly intolerable and make an utter farce of the proper and expeditious administration of justice". In offences involving motor accidents, the details of the occurrence are normally more important than the permanent features of the scene of incident which are normally recorded in a sketch plan and photographs. Thus, in *Mariapragasam* v. *Public Prosecutor*[3], Thomson C.J. in allowing an appeal against conviction for an offence under section 36(1) Road Traffic Ordinance, held that delays of about eight months from the date of incident was shocking, as these delays were very relevant to the merits of a case of that sort. Similarly, in the present case, to allow the two material witnesses to give evidence in 1982 or thereafter of a road accident that took place in September 1978 would be absurd, as their memory of the details of the mishap would have become blurred and unreliable.

Before me, the learned Deputy Public Prosecutor contends that the Magistrate must have acted under section 173(g) Criminal Procedure Code and erred in law in ordering the discharge amounting to an acquittal without hearing the case for the Prosecution. Citing the case of *Public Prosecutor* v. *Hettiarachigae L.S. Perera*[4], *Public Prosecutor* v. *Mahmud*[5] and *Chu Chee Peng* v. *Public Prosecutor*[6] as authorities, it seems to be suggested that the law is now settled that on the facts of the present case, the court is helpless and impotent to do anything except to repeat the order of discharge not amounting to an acquittal and thereby enable the Prosecution to charge the Respondent for the same offence for the third time and, indeed, for any number of times in the future notwithstanding the delay of more than three years, and the Prosecution's clear inability to proceed with their case, apart from the six witnesses whose evidence had been recorded in the first prosecution. With respect, I cannot accept that the law is now settled that a Magistrate cannot acquit an accused person in circumstances where there have been shocking and inordinate delays due to indolence on the prosecution's part and where the process of court has been so flagrantly abused as in the present case so as to make mockery of justice. From the appeal record, the learned Magistrate, in acquitting the Respondent, was not acting under section 173(g) which provides:

> "Nothing in paragraph (f) shall be deemed to prevent the court from discharging the accused at any previous stage of the case if for reasons to be recorded by the court it considers the charge to be groundless."

Further, the facts of the present case do not disclose that the charge is groundless. There is nothing groundless about the charge. It should be observed that paragraph (g) is concerned with groundless charge. The word "groundless" is defined in the *Shorter Oxford English Dictionary* to mean, "destitute of foundation, authority or support; having no real cause or reason; unfounded". To my mind, merely because the Prosecution have failed to exercise due diligence in tracing certain material witnesses does not render the charge groundless. The case of *Public Prosecutor* v. *Karumah*[7] does not therefore apply as there Harun J. was dealing with section 173(g) Criminal Procedure Code and he was giving a guideline as to the circumstances under which postponement should be granted by Magistrates. The learned Judge held that where investigation had not been completed, the court shall apply *Public Prosecutor* v. *Tan Kam San*[8] and refuse Prosecution's application for postponement, but if investigation was completed and the Prosecution apply for postponement on other grounds, it should apply *Public Prosecutor* v. *Hettiarachigae L.S. Perera (ante)* and grant the postponement. Consistent with other decided cases, the reason for Prosecution's application for postponement was given great emphasis by the learned Judge. To my mind, the discretion given to Magistrates by section 259 Criminal Procedure Code is very wide, and each application for a postponement either by Prosecution or the Defence must be determined on its own merits. As stated earlier, in this appeal, we are not in fact concerned with section 173(g) Criminal Procedure Code. Nor

are we concerned whether the learned Magistrate was right in refusing to allow further postponement. At the risk of being repetitive, it is common ground that the application for postponement was correctly refused in the circumstances of the case. In the first prosecution, it was partly-heard. The case would similarly have been partly-heard if the Prosecution had proceeded with the trial on the second occasion, as they would not have been able to establish a *prima facie* case without the evidence of the two material witnesses. In that event, is the Respondent entitled to an acquittal under section 173(f) Criminal Procedure Code? The issue for determination in this appeal is this. When a Magistrate has properly exercised the discretion to refuse a further postponement under section 259 Criminal Procedure Code after a final postponement has been granted, is the Magistrate entitled to acquit the accused under section 173(f), when the Prosecution refuse or are unable to proceed with their case on the date fixed for final disposal? If the answer is in the negative, then it would, in my judgment, be tantamount to allowing the Prosecution to disregard the court order of final postponement with impunity and to disregard the duty imposed on them by section 173(c) Criminal Procedure Code. The Prosecution can of course appeal against the order of final postponement, but in the absence of an appeal, they cannot ignore such order, and as stated by Lord Wilberforce in *Malloch* v. *Aberdeen Corporation*[9], "The court does not act in vain". Yet, that would in effect be the result if the situation were to be artificially described as "groundless charge" under section 173(g), which enables the Prosecution to re-charge the accused practically on the same day after his discharge, and thus rendering a mockery of the court order of final postponement. In that situation, where the charge is not groundless and where the Prosecution do not wish to withdraw the charge under section 254, I am of the view that the court is empowered under section 173(f) to acquit the accused, as the Prosecution have failed to adduce evidence in support of their case and, as such, the court should find no case against the accused has been made out which, if unrebutted, would warrant a conviction.

In *Public Prosecutor* v. *Goh Kee Chuan*[10], it was held that a Magistrate has no power to acquit and discharge an accused person upon a preliminary objection without hearing evidence on behalf of the Prosecution. In that case, Ong Hock Sim J. (as he then was) expressed the view that upon preliminary objections which only affected procedure, for a Magistrate to acquit and discharge without hearing evidence is going too far. In the present appeal, we are not dealing with acquittal following a preliminary objection on procedure. Similarly, the facts in *Public Prosecutor* v. *Mahmud (ante)* are entirely different. In that case, on the accused pleading guilty, the Prosecution proceeded to give the brief facts of the case. Without asking the accused whether he admitted the brief facts, the Magistrate acquitted the accused under section 183(g) of Criminal Procedure Code (S.S. Cap. 21) which was *in pari materia* with section 173(g). Ong Hock Sim F.J. held that it was not open to a Magistrate to acquit an accused person without hearing evidence. That case is distinguishable, in that, if the Magistrate did not accept the brief facts as sufficient to constitute the offence charged, then he should have recorded a plea of not guilty, and proceeded to hear prosecution evidence. But the Magistrate had no power to acquit under section 173(g) without taking any evidence at all. Whereas in the present appeal, six witnesses had given evidence in the earlier proceedings before the same Magistrate, and the learned Magistrate did not order the acquittal under section 173(g). However, in *Goh Kee Chuan case (ante),* Ong Hock Sim J. (as he then was) did refer to a passage of Murray-Aynsley J.'s judgment in *Kuppusamy* v. *Public Prosecutor*[11] which says:

> "I think it is clear that the earliest stage at which a Magistrate can acquit an accused person is after hearing all the evidence for the prosecution."

I respectfully agree with that passage except that for reasons to be stated later, the words "all the evidence for the prosecution" must legally mean "all the available evidence for the prosecution."

Chu Chee Peng v. *Public Prosecutor (ante),* the last case relied upon by the learned Deputy Public Prosecutor, is also concerned with the scope of Section 173(g) Criminal Procedure Code and as to whether the principle of *res judicata* and/or doctrine of estoppel is applicable in a case of a person discharged under section 173(g), when he is re-tried in a fresh trial on the same charge. The judgment of the Federal Court hinges on the plea of *autrefois acquit* and, as such, is not really relevant to the present appeal. In my view, neither *Chu Chee Peng case* nor the other cases relied upon by the Deputy Public Prosecutor are authorities for the proposition that an accused person cannot

be acquitted under section 173(f) after all the available Prosecution evidence at the trial have been heard and taken, or when the Prosecution are unable to comply with their obligation under section 173(c) Criminal Procedure Code. Indeed, in *State of Mysore* v. *Abdul Hameed Khan*[12], the respondent was acquitted by a Magistrate without hearing any evidence on a charge under section 304A Indian Penal Code for driving a motor-bus in a rash and negligent manner which resulted in the death of a bullock-carter. In dismissing the appeal against acquittal, it was held by a court of two Judges that the Prosecution were not diligent in bringing their witnesses to court, and the Magistrate was justified in refusing further adjournment and pronouncing decision on available evidence. In the present appeal, the true position is that there was a deadlock. The court had correctly given a final postponement and insisted that the Prosecution should proceed to produce their evidence in support of their case as required by section 173(c) Criminal Procedure Code, but the Prosecution were not ready to proceed without showing good reasons, and nor were they prepared to withdraw the charge notwithstanding the shocking delays and the improbability of their material witnesses being traced.

In a summary trial before a Magistrate, Section 173(c) Criminal Procedure Code provides:

"If the accused refuses to plead or does not plead or claims to be tried the court shall proceed to hear the complainant (if any) and to take all such evidence as may be produced in support of the prosecution."

The next relevant provision is Section 173(f) which states:

"If, upon taking all the evidence hereinbefore referred to, the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the court shall record an order of acquittal."

It is interesting to note that Regulation 13 of the Essential (Security Cases) Regulations 1975 has adopted the following words:

"When the case for the prosecution is closed, the court shall call on the accused to enter his defence."

Whereas Section 173(f) does not expressly mention closure of the Prosecution case. It merely makes acquittal of the accused mandatory, *if upon taking all the evidence hereinbefore referred to,* the court finds that no case against the accused has been made out which, if unrebutted, would warrant a conviction. "The evidence hereinbefore referred to" must refer to evidence produced by the Prosecution under paragraph (c) and evidence produced at the instance of the court under paragraph (d). We are here not concerned with evidence under paragraph (d). But under paragraph (c) when the accused claims to be tried, it is the duty of the court to take all such evidence as may be produced in support of the Prosecution. In my judgment, "all such evidence" in paragraph (c) must refer to *all such available evidence as may be produced in support of the Prosecution at the trial.* It cannot possibly refer to evidence which is not available at the trial. It therefore follows that Section 173(f) refers to the stage when all available evidence referred to in paragraphs (c) and (d) have been heard and taken, and that would be the end or closure of the Prosecution case. In the deadlock or stalemate situation, there appears to be an ambiguity in the provisions of our Criminal Procedure Code. The charge is not groundless under Section 173(g); the Prosecution do not intend to withdraw the charge under Section 254 Criminal Procedure Code; the Magistrate has exercised his discretion judicially in refusing to allow further postponement after an order of final postponement has been made under Section 259, and the Prosecution are unable to produce evidence in support of their case as required by Section 173(c). What is the Magistrate supposed to do in that situation? In *Public Prosecutor* v. *Sihabduin bin Haji Salleh & Anor.*[13], the majority judgment of the Federal Court has this to say:

"Fourthly, in criminal law, because of the cardinal principle that an accused person is presumed innocent and that it is the duty of the prosecution to prove his guilt, any ambiguity in a statute must be resolved in favour of the liberty of the subject."

Adopting that principle of criminal law, I hold the view that the words "all such evidence" in paragraph (c) and the words "all the evidence" in paragraph (f) of Section 173 Criminal Procedure Code must refer to *available evidence* at the time of trial. It cannot refer to non-available evidence at the trial. When, therefore, a Magistrate has exercised his discretion properly under Section 259 Criminal Procedure Code in refusing to allow a further postponement after a final postponement has been granted, it is the duty of the Magistrate under Section 173(c) to take all such available evidence as may be produced by the Prosecution in support of their case. If no such evidence is forthcoming or if the available evidence adduced is insufficient to establish a *prima facie* case against the accused, then the Magistrate is entitled to

record an order of acquittal under Section 173(f) Criminal Procedure Code. In this appeal, the proper exercise of the Magistrate's discretion under Section 259 Criminal Procedure Code has not been challenged, having regard to all the circumstances of the case. As such, the learned Magistrate did not err in law in ordering an acquittal of the Respondent under Section 173(f).

As stated earlier, taking the provisions of Section 173(a) to (f) together, I am of the opinion that the "taking of all evidence" in sub-sections (c) and (f) means, the taking of all *available* evidence. It stands to reason that the court can only record such available evidence as the Prosecution are able to produce at the trial and not at any indefinite time in the future or at any future time convenient to the Prosecution. Once the date of hearing has been fixed, it is the duty of the Prosecution on the posted date to produce all their available evidence in support of their case and it is the duty of the court to record such evidence. Thus, if upon taking all the available evidence hereinbefore referred to, the court finds that no case against the accused has been made out, which, if rebutted, would warrant a conviction, the court shall record an order of acquittal. In this appeal, it is not a case of the court refusing to hear and record evidence in support of Proseuction case. On the contrary, it is a case of Prosecution's inability to produce their evidence, although more than reasonable time has been given to enable them to do so.

It is significant that the provision of paragraph (g) regarding the charge being groundless comes immediately after paragraph (f) of Section 173, and it commences with the words "nothing in paragraph (f) shall be deemed to prevent ...". Thus, paragraph (g) should not be interpreted to restrict the power of the court to acquit under paragraph (f) in appropriate cases. On the contrary, the power under paragraph (g) is intended to be an additional power and should not be allowed to whittle down the power conferred by paragraph (f). To my mind, the proper interpretation of Section 173 Criminal Procedure Code is that when the accused claims to be tried under paragraph (c) and the Prosecution is unable to proceed on the date of hearing because there is no available evidence for the court to take, then the court would find no case has been made out against the accused and the court should record an order of acquittal under paragraph (f), unless the Prosecution can show good reasons for their inability to make their evidence available, in which case a postponement can be granted. But even if the Prosecution had available evidence at the trial and ready to proceed, the court could discharge the accused if it considered the charge to be groundless under paragraph (g). The purpose of Section 173(g) can be found in the following passage of Ong C.J.'s judgment in *Chu Chee Peng case (ante)* at page 36B:

> "There are constantly cases coming up in subordinate courts where the very corner-stone in the prosecution case collapses at an early stage for a variety of reasons. In that event, should the Magistrate continue in the profitless labour of hearing the rest of the prosecution to the bitter end, whilst realising that at the close of the prosecution he would surely have to pronounce a verdict of acquittal? Without the express powers given him by paragraph (g) the futile exercise is inevitable."

In the instant appeal, the Prosecution case did not collapse due to the charge being groundless, but because of Prosecution's inability to comply with the provision of Section 173(c) Criminal Procedure Code.

There is, of course, no time limit to a criminal prosecution. But once a charge is preferred, the Prosecution must be prepared to proceed without unreasonable delay. Once the court takes cognizance of the case, justice demands that the court should decide as expeditiously as possible as to the guilt or innocence of the accused. Whilst the Prosecution are entitled to bring a person to court, it is never the law that they have a right of unlimited time to prove their case. There must be finality in any court proceedings. Although Article 145(3) of the Federal Constitution provides that only the Attorney-General has the power to institute, conduct or discontinue any proceedings for an offence, once a prosecution is instituted in court, the Attorney-General is subject to the provisions of Section 173 Criminal Procedure Code in a summary trial, and he and his subordinates are bound to conduct the prosecution in accordance with law, unless they decide to discontinue the prosecution.

For the above reasons and having regard to the facts of the present case, I dismiss this appeal and confirm the order of acquittal.

Appeal dismissed.

Solicitors: *V.P. Nathan & Partners.*